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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BETTY G. BROWNING,
Petitioner,

v.

CLERK, UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 3, 1986

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QUESTIONS PRESENTED

1. Does the Speech or Debate Clause of the United States Constitution bar lawsuits brought under the Fifth Amendment against congressmen or congressional personnel officers for firing congressional employees on account of race?

2. Even if the Speech or Debate Clause does bar certain suits for racially discriminatory firings of congressional employees, does it bar suits for the firing of employees who perform wholly ministerial duties—in this case a verbatim stenographer—and who have no discretionary or deliberative input into the legislative process?

LIST OF PARTIES

The parties to this proceeding are the petitioner, Betty G. Browning, and the respondents, the Clerk of the United States House of Representatives; the Speaker of the House of Representatives; Thomas Ladd, the Assistant to the Clerk of the House of Representatives; and Geraldine Lyda, the Director of the Office of Official Reporters for the House of Representatives. These parties were also the parties to the proceedings below.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Betty G. Browning, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-captioned proceeding on April 25, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 789 F.2d 923 (D.C. Cir. 1986), and is reprinted in the Appendix hereto at App. 1a. The order of the court of appeals denying Ms. Browning's suggestion for rehearing *en banc* and the separate opinions of Judges Ginsburg and MacKinnon on the suggestion are reported at 793 F.2d 380

(D.C. Cir. 1986), and are reprinted in the Appendix hereto at App. 18a.

The order of the United States District Court for the District of Columbia denying respondents' motion to dismiss petitioner's complaint is unreported. It is reprinted in the Appendix hereto at App. 21a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit of which review is sought was entered on April 25, 1986. On July 8, 1986, the court of appeals denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 6, clause 1 of the United States Constitution provides as follows:

> "The Senators and Representatives shall receive a Compensation for their Services to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

The Fifth Amendment to the Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same

offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner Betty G. Browning was employed as an Official Reporter by the United States House of Representatives from August 1974 until October 1, 1981. Ms. Browning was the first black person employed as an Official Reporter. During her tenure, she was the only black so employed. App. 3a (court of appeals opinion).

Ms. Browning's work as an Official Reporter was entirely ministerial. Her primary duty was the verbatim transcription of House committee and subcommittee proceedings. Ms. Browning was not authorized to exercise any discretion in this task. Indeed, she did not even prepare final transcripts of the hearings that she covered. Instead, Ms. Browning's stenotype notes were transcribed into text by other House employees. Browning Affidavit ¶ 2 (JA 13-14).[1] As the district court put it, Ms. Browning was the "human equivalent of a tape recorder." App. 23a, *quoted in* App. 12a n.11 (court of appeals opinion).

On October 1, 1981, the Clerk of the House of Representatives—who has responsibility for overseeing the Office of Official Reporters in which Ms. Browning was employed—directed that Ms. Browning be fired. On May 29, 1984, Ms. Browning filed suit in the United States District Court for the District of Columbia. She alleged that because of her race she had been discriminated against in her employment and ultimately fired, in violation of the Due Process Clause of the Fifth Amendment. Complaint ¶¶ 10-12 (JA 6). Seeking compensatory and punitive damages, Ms. Browning named as defendants

[1] "JA" refers to the Joint Appendix filed by the parties in the court below.

(i) the Clerk of the House of Representatives, who directed her firing; (ii) Thomas Ladd, the Assistant to the Clerk, who had specific responsibility for personnel decisions and who participated in the decision to fire Ms. Browning; (iii) Geraldine Lyda, Ms. Browning's immediate supervisor, who was involved in the discriminatory treatment of Ms. Browning and the decision to fire her; and (iv) the Speaker of the House of Representatives. Complaint ¶¶ 3-6 (JA 4-5). Ms. Browning sued the Speaker only in his supervisory capacity over the other defendants. Complaint ¶ 13 (JA 6-7). The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331.

Defendants moved to dismiss Ms. Browning's complaint on the ground that her suit was barred by the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1.[2] On December 17, 1984, after oral argument, the district court entered an order denying defendants' motion. App. 21a. The district court held that Speech or Debate Clause immunity does not apply to congressional personnel decisions involving House reporters. App. 22a-23a; App. 11a & n.11 (citing district court order and argument transcript).

The Court of Appeals for the District of Columbia Circuit reversed. As the case arose on appeal from the denial of a motion to dismiss, the court acknowledged that it had to accept Ms. Browning's allegations as true. App. 3a (citing *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974)). Nonetheless, the court of appeals held that the Speech or Debate Clause barred Ms. Browning's complaint that she was fired on account of her race. In his opinion for the court, Judge MacKinnon ruled that the Clause applies to employee-termination decisions, and rejected a standard that would limit the scope of im-

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[2] Defendants also asserted official immunity and argued that Ms. Browning had failed to state a claim upon which relief could be granted. The court of appeals below did not reach either of these issues. App. 7a n.7.

munity under the Clause "to personnel actions where the employee has discretionary input into the legislative process." App. 12a. Rather, Judge MacKinnon held, "the standard for determining Speech or Debate Clause immunity is best expressed as whether the employee's duties were *directly related to the due functioning of the legislative process.*" App. 13a (emphasis in original). The court found that Ms. Browning's duties fell within this standard. Accordingly, it reversed the district court's decision and directed that Ms. Browning's complaint be dismissed for want of subject matter jurisdiction.[3]

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[3] In its opinion, the court of appeals misstated several elements of the district court record. Citing an affidavit Ms. Browning filed in support of her opposition to defendants' motion to dismiss, the court of appeals stated that Ms. Browning was discharged "for gross errors and omissions in a particular committee reporting assignment and generally for the low quality of her reporting," and that "Browning admitted these errors below." App. 2a (citing Browning Aff. ¶ 8 (JA 16)); *see also* App. 4a, 5a. In fact, Ms. Browning's affidavit conceded only that she had made "some mistakes" in the stenotype reporting of a single hearing. Browning Aff. ¶ 8 (JA 16). Ms. Browning further stated, "I do not believe [these mistakes] were so extensive as Ms. Lyda claimed, nor has such a matter come up in the course of my employment at any time before or since." *Id.* Indeed, the district court record abounds with testimonials from congressmen, congressional staff, and witnesses praising Ms. Browning's work as a reporter. Browning Aff., Exhibits A, B (JA 19-38).

Although these misstatements of fact color the D.C. Circuit's opinion, this Court need not concern itself with them given the procedural posture of this case. As noted, because the case was decided below on a motion to dismiss, the appellate court acknowledged that it was required to accept as true Ms. Browning's allegations that she was a diligent and competent reporter who was dismissed on account of her race. *See* App. 3a (citing *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974)). Thus, the consequence of the holding below is that even if an Official Reporter performs her duties flawlessly and is dismissed solely as a result of her race, a lawsuit against those who fired her would be barred by the Speech or Debate Clause. It is this holding—not the factual misstatements of the court below—of which review is sought.

On June 9, 1986, Ms. Browning filed a petition for rehearing and suggestion for rehearing *en banc*. The court of appeals denied both requests on July 8, 1986. In connection with the suggestion for rehearing *en banc*, Judge Ginsburg wrote separately to note a conflict between the D.C. Circuit's opinion in *Browning* and an earlier decision of the United States Court of Appeals for the Fifth Circuit. *See Davis* v. *Passman*, 544 F.2d 865, 880 (5th Cir. 1977), *rev'd en banc on other grounds*, 571 F.2d 793 (5th Cir. 1978), *rev'd*, 442 U.S. 228 (1979). Judge Ginsburg stated that "the different views held by federal judges on congressional immunity from suit for alleged employment discrimination indicate the need for further enlightenment from Higher Authority." App. 20a.

REASONS FOR GRANTING THE WRIT

In *Davis* v. *Passman*, 442 U.S. 228 (1979), this Court established an implied cause of action for damages under the Fifth Amendment for the discriminatory firing of congressional employees. The *Passman* Court left open, however, the question whether the Speech or Debate Clause would shield such conduct from suit. *Id.* at 236 n.11. This case presents the question left open in *Passman*.

The opinion below resolves that question in a manner inconsistent with the decisions of other circuit courts of appeals. The holding of the D.C. Circuit in this case is that the firing of a verbatim stenographer for the House of Representatives—even if based solely on race—is absolutely immune from judicial scrutiny as a consequence of the Speech or Debate Clause. As Judge Ginsburg noted in her separate opinion on Ms. Browning's suggestion for rehearing *en banc*, that holding "is inconsistent with the views expressed by the original Fifth Circuit panel" in *Passman* itself, which held that congressional personnel decisions are not covered by the

Speech or Debate Clause at all. App. 19a (citing *Davis* v. *Passman*, 544 F.2d at 880).[4]

The D.C. Circuit's holding is also inconsistent with the First Circuit's decision in *Agromayor* v. *Colberg*, 738 F.2d 55 (1st Cir.), *cert. denied*, 105 S. Ct. 515 (1984), which held that although absolute legislative immunity attaches to certain legislative personnel decisions, it applies only to those decisions involving employees with "meaningful input" into the legislative process. Similarly, the decision below is inconsistent in principle with the Seventh Circuit's recent decision that the doctrine of absolute judicial immunity, a doctrine analogous to the absolute legislative immunity embodied in the Speech or Debate Clause, does not bar suits by court reporters alleging that they have been fired because of their race. *See McMillan* v. *Svetanoff*, 793 F.2d 149 (7th Cir. 1986).

Finally, by declining to balance Speech or Debate Clause immunity against the Fifth Amendment rights upheld by the Supreme Court in *Passman*, the court below has rendered this Court's decision in *Passman* a largely theoretical exercise. The consequences not only for racial discrimination against government employees—but also for discrimination on such grounds as sex, religion, or national origin—are enormous, and do indeed render this case appropriate for review by the "Higher Authority" of this Court.

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[4] The *Passman* panel's decision in favor of the plaintiff was reversed on other grounds by the Fifth Circuit sitting *en banc*. *Davis* v. *Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc), *rev'd*, 442 U.S. 228 (1979). The *en banc* court held that "no civil action for damages" could be implied under the Fifth Amendment, and thus did not address the effect of the Speech or Debate Clause on such an action. *Id.* at 801. The *en banc* court's holding was in turn reversed by this Court, which—as noted above—also did not reach the Speech or Debate Clause issue. *See* 442 U.S. at 236 n.11.

I. The Decision Below Conflicts with the Fifth Circuit's Determination that Congressional Personnel Decisions Are Not Immunized by the Speech or Debate Clause

In *Davis* v. *Passman*, the Fifth Circuit determined that Speech or Debate Clause immunity does not apply to congressional personnel decisions—a result in conflict with the D.C. Circuit's decision below. In *Passman*, in which a congressman explained that he was firing his deputy administrative assistant because "it was essential that the understudy to my Administrative Assistant be a man," the Fifth Circuit held that the Speech or Debate Clause does not immunize congressmen "from inquiry into their decisions to dismiss staff members." *Passman*, 544 F.2d at 868 n.1, 880.

Four members of this Court have reached a conclusion similar to that of the Fifth Circuit, and inconsistent with the decision of the D.C. Circuit below. *See Nixon* v. *Fitzgerald*, 457 U.S. 731, 767 n.2 (1982) (White, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) ("[A] personnel decision allegedly made for unlawful reasons . . . does not fall within the . . . legislative . . . functions to which absolute immunity attaches."), *quoted in Walker* v. *Jones*, 733 F.2d 923, 930 (D.C. Cir.), *cert. denied*, 105 S. Ct. 512 (1984). That view, that "Members of Congress . . . could . . . [be] liable for . . . a personnel decision allegedly made for unlawful reasons," *Nixon* v. *Fitzgerald*, 457 U.S. at 767 n.2 (White, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting), is shared by the commentators. *See, e.g.*, L. Tribe, *American Constitutional Law* § 5-18, at 293 n.9 (1978) ("[T]here is no reason to suppose that members of Congress are free to ignore civil rights statutes in hiring and firing staff members.") (citing *Davis* v. *Passman*, 544 F.2d at 871).[5] In addition, the Fifth Circuit's decision

[5] *See also* Comment, *Speech or Debate Clause Immunity for Congressional Hiring Practices: Its Necessity and Its Implications*, 28 UCLA L. Rev. 217, 218 (1980) ("[A] legislator's discretionary

in *Passman* has been cited with approval by the Third Circuit, *see In re Grand Jury Proceedings*, 563 F.2d 577, 584 (3d Cir. 1977), and the Eighth Circuit has held that the doctrine of absolute judicial immunity does not extend to a judge's "decision of whom to retain as a hearing officer," because that decision "is not an official judicial act . . . [but rather] is an administrative personnel decision," *Goodwin* v. *Circuit Court*, 729 F.2d 541, 549 (8th Cir.), *cert. denied*, 105 S. Ct. 112 (1984).

1. The Fifth Circuit's decision in *Passman* drew heavily on decisions of this Court, particularly *Gravel* v. *United States*, 408 U.S. 606 (1972), and *Doe* v. *McMillan*, 412 U.S. 306 (1973). As the Fifth Circuit noted, *Gravel* concluded that this Court's speech or debate cases "reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." *Gravel*, 408 U.S. at 620, *quoted in Passman*, 544 F.2d at 879. The fact that "Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Id.* at 625, *quoted in Passman*, 544 F.2d at 879. Rather, the *Gravel* Court emphasized that the purpose of the Speech or Debate Clause is "freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct *as a legislator*." *Id.* at 618, *quoted in Passman*, 544 F.2d at 879 (emphasis added in *Passman*).

As the Fifth Circuit also noted, a year after *Gravel*, in *Doe* v. *McMillan*, 412 U.S. 306 (1973), "the Supreme Court reiterated the limited scope of the clause" by reject-

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employment decisions regarding staff should not be considered by the Court to fall within the ambit of speech or debate clause immunity.").

ing the argument that publication and distribution of a committee report were activities essential to the legislative process and therefore protected from judicial scrutiny by the Speech or Debate Clause. *Passman*, 544 F.2d at 880. The *Doe* Court explained that " '[t]his Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role.' " *Doe*, 412 U.S. at 320 (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951)), *quoted in Passman*, 544 F.2d at 880.

The decisions in *Gravel* and *Doe*, the Fifth Circuit held, "compel the conclusion that representatives are not immune from inquiry into their decisions to dismiss staff members." *Passman*, 544 F.2d at 880. Rather, "[w]hen members of Congress dismiss employees they are neither legislating nor formulating legislation. The fear of judicial inquiry into dismissal decisions cannot possibly affect a legislator's decisions on matters pending before Congress. The democratic process remains unfettered." *Id.*

2. The Fifth Circuit's decision that congressional personnel decisions are outside the ambit of the Speech or Debate Clause is also consistent with—and the D.C. Circuit's decision here is inconsistent with—the distinction this Court has drawn between "legislative speech or debate and associated matters" on the one hand, and "executing a legislative order" or "carrying out [legislative] directions" on the other hand. *Gravel*, 408 U.S. at 620-21; *see Doe* v. *McMillan*, 412 U.S. at 314-15; *Walker* v. *Jones*, 733 F.2d 923, 931-32 (D.C. Cir.), *cert. denied*, 105 S. Ct. 512 (1984); L. Tribe, *American Constitutional Law* § 5-18, at 295-96 & nn.22, 23 (1978). As Justice White explained in *Gravel*, that distinction was at the root of the Court's Speech or Debate Clause decisions in *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), and *Powell* v. *McCormack*, 395 U.S. 486 (1969).

In *Kilbourn*, the Court found that the Speech or Debate Clause immunized from suit House members who had adopted a resolution authorizing the plaintiff's arrest. The Court also held, however, that "the resolution was [still] subject to judicial review insofar as its *execution* impinged on a citizen's rights . . . . That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest." *Gravel*, 408 U.S. at 618 (citing *Kilbourn*, 103 U.S. at 202) (emphasis added). "The Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act." *Id.* at 619. Similarly, in *Powell* v. *McCormack*, the Court held that although House members could not be sued for passing a resolution illegally excluding a representative-elect from the House, House aides who sought to implement the invalid resolution were subject to suit. *See Gravel*, 408 U.S. at 620 (citing *Powell* v. *McCormack*, 395 U.S. 486 (1969)). As the Court summarized in *Gravel*, no "case has held that Members of Congress would be immune if they executed an invalid resolution by themselves . . . . Neither they nor their aides should be immune from liability or questioning in such circumstances." *Id.* at 621.

The D.C. Circuit's rejection of the legislation/execution distinction in its opinion below is made readily apparent by consideration of a hypothetical. If Congress had passed a statute expressly firing Betty Browning because she was black, it is clear that she could not have sued individual members based on their votes. It is equally clear, however, that she could have obtained judicial review of the constitutionality of the statute itself—otherwise, the concept of judicial review would be a nullity. And, as *Gravel*, *Powell*, and *Kilbourn* teach, the method of obtaining judicial review would be to sue those who attempted to implement the firing. Moreover, as *Gravel* further holds, the key distinction is *not* between congressmen and

their aides, but rather between legislative and executive acts: both a congressman and his aides are immune for the former, but both are also subject to suit for the latter. *Gravel*, 408 U.S. at 620, 621.[6]

Ms. Browning's actual case follows *a fortiori* from this distinction. No legislative decision was made to fire Betty Browning; the decision was a purely administrative one made by the House Clerk and two mid-level House employees. *Cf. Goodwin* v. *Circuit Court*, 729 F.2d 541, 549 (8th Cir.) ("The decision of whom to retain . . . is not an official judicial act. It is an administrative personnel decision."), *cert. denied*, 105 S. Ct. 112 (1984). Indeed, neither Ms. Browning nor the respondents have alleged that a member of Congress was involved in the decision to fire her. The Speaker of the House, the only congressman implicated in this suit, is charged only in his capacity as ultimate superintendent of the administrative functions of the House. Complaint ¶ 13 (JA 6-7). Since *Powell* and *Kilbourn* would permit Ms. Browning to sue those who carried out her firing *even if* they had been directed to do so by legislation or legislators, she plainly can sue those who in fact fired her without any legislative direction whatsoever. Under this Court's decisions, the Speech or Debate Clause does not bar such an assertion of Ms. Browning's Fifth Amendment rights.

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[6] As the Court suggested in *Gravel* and *Powell*, this distinction between legislation and execution is central to the viability of judicial review. *See Gravel*, 408 U.S. at 618, 620; *Powell*, 395 U.S. at 503-04; *see also* L. Tribe, *supra*, at 295 & n.22 ("[W]ithout formally requiring legislators or their aides to answer personally for legislative acts, it is possible, by 'questioning' the legality or constitutionality of the legislative acts' nonlegislative aspects, for courts indirectly to review the legislative action itself."). Indeed, without such a distinction, Speech or Debate Clause immunity would effectively preclude judicial review of unconstitutional legislation. The *Gravel* Court recognized that the distinction is in effect a "reassert[ion of] judicial power to determine the validity of legislative actions impinging on individual rights." *Gravel*, 408 U.S. at 620.

II. The Decision Below Is Inconsistent with the First Circuit's Determination that the Only Personnel Decisions to Which Absolute Legislative Immunity Attaches Are Those Involving Employees with "Meaningful Input" into the Legislative Process

In *Agromayor* v. *Colberg*, 738 F.2d 55 (1st Cir.), *cert. denied*, 105 S. Ct. 515 (1984), the First Circuit declined to adopt the Fifth Circuit's position that all personnel decisions are beyond the scope of absolute legislative immunity. *Id.* at 59-60. But the *Agromayor* court was also unwilling to adopt the opposite extreme—that all such decisions are immunized. Taking instead a middle position, the First Circuit held that the hiring or firing of an employee is protected by legislative immunity if, but only if, the employee has " 'meaningful input' with regard to the legislative function." *Id.* at 60. By extending Speech or Debate Clause immunity to the decision to fire Betty Browning—a verbatim stenographer—the D.C. Circuit below adopted a position inconsistent with that advanced in *Agromayor*.[7]

1. *Agromayor* was based on language from this Court's decision in *Gravel*. There, the Court held that insofar as the Speech or Debate Clause reaches matters other than speech or debate, "they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Reasoning that an employee who deals with " 'the deliberative and communicative processes,' . . . must be of direct legislative importance" as well, the First Circuit concluded that the hiring or firing of employees with such "meaningful input"—but only of those employees—is also "essential" to the legislative process. *Agromayor*, 738 F.2d at 59-60 (quoting *Gravel*, 408 U.S. at 625).

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[7] *Agromayor* did not involve the Speech or Debate Clause itself, but rather the analogous doctrine of federal common law immunity for state legislators.

The First Circuit's "meaningful input" test for legislative immunity is similar to a standard that the Seventh Circuit recently employed to determine the scope of the analogous doctrine of judicial immunity. In *McMillan* v. *Svetanoff*, 793 F.2d 149 (7th Cir. 1986), the court held that a judge's allegedly discriminatory firing of a court reporter based on her race and political affiliation was not protected from scrutiny by judicial immunity. Just as Speech or Debate Clause immunity is designed to insure legislative independence and protect the integrity of the legislative process, *see Gravel*, 408 U.S. at 616-17, so "[t]he purpose of judicial immunity is to protect the public's interest in an independent judiciary . . . [and] to protect the integrity of the judicial process." *McMillan*, 793 F.2d at 150-51. Taking that purpose into account, the Seventh Circuit concluded that unlike the firing of an employee who "advised the judge on substantive decisionmaking," the firing of a court reporter did not place "the judge's own discretion . . . sufficiently at risk to fall within the doctrine's purpose." *Id.* at 152. Because it found that "allowing judges to hire and fire court reporters with impunity will not further the objectives of the judicial immunity doctrine—principled decisionmaking," the Seventh Circuit "declin[ed] to extend [immunity] to a judge's decision to terminate a court reporter." *Id.* at 155.

2. The district court in the instant case adopted a test for immunity quite similar to that employed by the First Circuit in *Agromayor* and the Seventh Circuit in *McMillan*. The district court required "that before immunity will apply, the congressional employee's duties must entail *discretionary* input into the legislative process." App. 11a (characterizing district court's holding) (emphasis in original). "[T]here is a fundamental difference," Judge Jackson concluded, "between a member reporter who *selectively* records, as a recording secretary, the minutes of a meeting and *makes editorial judgments*, . . . and *a verbatim transcript*, which is the human

equivalent of a tape recorder." App. 22a-23a, *quoted in* App. 12a n.11 (emphasis added by court of appeals).

As an Official Reporter, Ms. Browning was indeed "the human equivalent of a tape recorder." She was a wholly ministerial employee, whose duties involved the verbatim transcription of House proceedings. She had no editorial or advisory role, and—unlike a congressman's legislative or administrative assistant—she made no decisions whatsoever relating to the conduct or substance of hearings or reports. As Ms. Browning lacked any discretionary input into the legislative process, Judge Jackson refused to raise the Speech or Debate Clause as a bar to her complaint of racial discrimination.

3. The D.C. Circuit, however, rejected the district court's test: "To limit the scope of the Speech or Debate Clause immunity to personnel actions where the employee has discretionary input into the legislative process is far too restrictive a view." App. 12a. Instead, the court below held, the test for Speech or Debate Clause immunity is "whether the employee's duties were *directly related to the due functioning of the legislative process.*" App. 13a (emphasis in original).[8] Moreover, the court had "little doubt" that Ms. Browning's work was in fact "directly related to the legislative process." App. 13a. Browning, the court explained, had been called on to record testimony at an important legislative hearing, and it is "well-recognized" that such investigations are "part of the due functioning of the House of Representatives." App. 14a. "Surely," the court reasoned, "the recordation of these proceedings was [also] directly related to the proper execution of this legislative investigation." App. 14a.

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[8] *But see United States* v. *Brewster*, 408 U.S. 501, 515 (1972) ("In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process.") (emphasis in original).

Not only is the D.C. Circuit's rejection of the "discretionary input" test in favor of a "directly related to the legislative process" test inconsistent with the decisions of other circuits, it also lacks a supporting rationale consistent with the purposes of the Speech or Debate Clause. According to Judge MacKinnon, Ms. Browning's suit had to be barred by Speech or Debate Clause immunity because of "the questions a court would be required to pose in considering Browning's claim" if it were not barred. App. 15a. To assess that claim, Judge MacKinnon said, it would be necessary to inquire into such matters as "the nature of the hearings to which Browning was assigned, the purposes underlying those hearings, and whether Browning's performance frustrated those purposes." App. 15a. That kind of inquiry, the court held, "is exactly the sort of intrusion that the Speech or Debate Clause is designed to prevent." App. 15a.

But that kind of inquiry would in fact be wholly unnecessary in assessing the discrimination claims of a verbatim stenographer. Neither the nature nor the purpose of the hearings Betty Browning recorded is relevant to her claim that she was wrongly fired; the only issue involving those hearings is whether Ms. Browning accurately transcribed them. And that inquiry can be made without any intrusion into legislative prerogatives: *all that need be done is to compare Ms. Browning's stenotype notes to the tape recordings that were made of the hearings she recorded.* Indeed, the respondents have already asserted that precisely such a comparison was the source of their own dissatisfaction with Ms. Browning's work. App. 5a.

Notwithstanding the D.C. Circuit's view, such a judicial comparison of transcripts and tapes is hardly "the sort of intrusion that the Speech or Debate Clause is designed to prevent." App. 15a. To the contrary, because extending Speech or Debate Clause immunity to those responsible for the discriminatory termination of non-

discretionary employees like Betty Browning is not "necessary to prevent indirect impairment of [legislative] deliberations," *Gravel*, 408 U.S. at 625, such an absolute bar to the vindication of congressional employees' constitutional rights is wholly unwarranted.

III. The Decision Below Fails to Strike a Balance Between the Speech or Debate Clause and the Fifth Amendment

Because of the nature of the rights asserted by Ms. Browning, this case presents a conflict between two constitutional provisions. Even if the Speech or Debate Clause were intended to immunize congressional employment decisions involving verbatim stenographers, it still would not be the only constitutional provision at issue here. As this Court held in *Davis* v. *Passman*, 442 U.S. 228 (1979), the Due Process Clause of the Fifth Amendment—a provision of at least equal import and manifestly of later vintage—guarantees to Ms. Browning and all congressional employees the right to be free of precisely the form of discrimination alleged in this action.

The D.C. Circuit's decision below does not endeavor to harmonize the Fifth Amendment and the Speech or Debate Clause. To the contrary, in its effort to vindicate what it regarded as the correct reading of the Speech or Debate Clause, the D.C. Circuit effectively read the Fifth Amendment's Due Process Clause out of the Constitution for employees like Betty Browning. If congressional employees with no discretionary duties may be dismissed solely on account of their race, they also may be dismissed for their sex, religion, or national origin. Indeed, the D.C. Circuit's decision renders this Court's own opinion in *Davis* v. *Passman* a nullity on its facts. If the decision below were to stand, Congress could terminate a female employee because she is not "a man," notwithstanding this Court's determination that such conduct violates the Constitution's guarantee of equal justice under

law. The implications of such a decision—especially by the appellate court most likely to have jurisdiction over Speech or Debate Clause cases—are enormous.

Unlike the court below, the Fifth Circuit in *Passman* recognized that due process and equal protection concerns must temper the concerns that underlie speech or debate immunity. The Fifth Circuit noted "the fear of an unfounded but burdensome lawsuit" against a member of Congress, *Passman*, 544 F.2d at 880 n.25, but concluded that the continued availability of the qualified immunity provided by the good faith defense—as opposed to the absolute immunity provided by the Speech or Debate Clause—is sufficient to vindicate this concern. Under the good faith defense, defendants are entitled to dismissal of the plaintiff's case unless they reasonably should have known that they were violating a clearly established constitutional or statutory right. *See, e.g., Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). As a consequence of this defense, the *Passman* court concluded:

> "Representatives . . . will be subject to liability in only the most egregious cases. The very low likelihood of recovery in unfounded cases will make the number of filings low. Moreover, summary judgment procedures, if applied judiciously, will minimize any burden. The chance that a legislator's dismissal decision will be affected by the prospect of a burdensome but meritless suit is therefore remote. The prospect that a dismissal decision will in turn affect the legislative process is also extremely remote. . . . By limiting representatives to qualified immunity we achieve the immunity doctrine's goals without needlessly sacrificing the availability of redress for clear constitutional violations." *Passman*, 544 F.2d at 880 n.25.

In sum, there is no need to sacrifice the Due Process Clause to save the Speech or Debate Clause. Here, as in other cases that have come before this Court, "protecting the rights of others" need pose "[n]o threat to legislative

independence." *See Gravel* v. *United States*, 408 U.S. 606, 621 (1972); *cf. McMillan* v. *Svetanoff*, 793 F.2d 149, 155 (7th Cir. 1986) ("Shielding judges from personal liability in their hiring and firing decisions cannot outweigh the need to protect the constitutional rights of public employees."). Accordingly, Speech or Debate Clause immunity should not attach, and the D.C. Circuit's refusal to give Betty Browning her day in court should be reversed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 3, 1986

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 85-5144

BETTY G. BROWNING

v.

CLERK, U.S. HOUSE OF REPRESENTATIVES, *et al.*,
Appellants.

Argued Jan. 8, 1986

Decided April 25, 1986

Rehearing En Banc Denied
July 8, 1986

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 84-01637)

Steven R. Ross, with whom Charles Tiefer, Washington, D.C. was on the brief, for appellants.

Linda Huber, Washington, D.C., for appellee.

Before WALD and SILBERMAN, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge MacKINNON.

MacKINNON, Senior Circuit Judge:

Browning, the first black Official Reporter employed by the United States House of Representatives, was discharged after seven years for gross errors and omissions in a particular committee reporting assignment and generally for the low quality of her reporting. Browning admitted these errors below,[1] but alleged that the true reason behind her dismissal was racial animus, that the reasons given were pretextual, and that her discharge violated her rights under the equal protection/due process protections of the Fifth Amendment. The congressional defendants[2] moved to dismiss the suit asserting, *inter alia*, that Browning's claim was nonjusticiable under the immunity guaranteed by the Speech or Debate Clause of Article I.[3]

The district court, claiming reliance upon this court's decision in *Walker v. Jones*, 733 F.2d 923 (D.C.Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 512, 83 L.Ed.2d 402 (1984), ruled that the Speech or Debate Clause did not shield congressional personnel actions affecting Official Reporters from judicial scrutiny. Because we find

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[1] Browning Affidavit ¶ 8 (JA 16).

[2] The congressional appellants are Geraldine Lyda, the Director of the Office of Official Reporters for the House of Representatives; her supervisor, the Assistant to the Clerk of the House of Representatives, appellant Thomas Ladd; the Clerk of the House of Representatives, appellant Edmund L. Henshaw; and the Speaker of the House of Representatives, the Honorable Thomas P. O'Neill.

[3] United States Constitution, Art. 1, Sec. 6, Clause 2 provides:

> . . . for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.

that the district court misapplied this court's holding in *Walker* and that the Speech or Debate Clause does shield this congressional personnel action from judicial scrutiny, we reverse the district court and remand with instructions to dismiss Browning's suit.

I. BACKGROUND

This case comes to us on appeal from the district court's denial of a motion to dismiss for lack of subject matter jurisdiction. For purposes of this review, therefore, we must assume the truth of Browning's allegations. Moreover, as the Supreme Court has instructed, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

Browning was employed by the United States House of Representatives as an Official Reporter from August 1974 until October 1, 1981. Complaint ¶ 7 (Joint Appendix ("JA") 5). While an Official Reporter, Browning's direct supervisor was appellant Geraldine Lyda, the Director of the Office of Official Reporters for the House of Representatives, who in turn was supervised by the Assistant to the Clerk of the House of Representatives, appellant Thomas Ladd. Overall responsibility for the administrative affairs of the House of Representatives rested with the Clerk of the House of Representatives, appellant Edmund L. Henshaw, who in turn was responsible to the appellant Speaker of the House of Representatives, the Honorable Thomas P. O'Neill. All such congressional personnel were named as defendants.

Browning was the first black person hired by the House of Representatives as an Official Reporter and was the only black Official Reporter during her tenure. Complaint ¶ 7 (JA 5). Her duties as an Official Reporter entailed primarily the verbatim stenotype transcrip-

tion of committee and subcommittee hearings. Affidavit of Betty G. Browning ¶ 2 (JA 13). Browning alleges that she carried out her duties diligently and competently, although at the same time admitting incidents of poor performance.[4] Browning alleges that her termination was motivated by racial animus, Browning Affidavit ¶ 10 (JA 17), and that appellant Lyda engaged in a "campaign of hostility" against Browning that was racially motivated. *Id.* ¶ 5 (JA 14). For example, Browning alleges that Lyda would often assign her to cover hearings that would produce little testimony, and then complain of Browning's low production. *Id.* ¶ 6 (JA 15). Other alleged incidents include one in which Lyda made cruel and derogatory remarks about Browning in the presence of her coworkers. *Id.* Lyda also allegedly solicited complaints regarding Browning's performance, but would not permit Browning to examine these complaints or rebut them. *Id.* ¶ 7 (JA 15-16).

Browning further asserts that Lyda was able to enlist the aid of defendants Ladd and Henshaw in discharging Browning. Both Ladd and Henshaw, in communications with Browning, refer to a particular incident where her performance was poor, but Browning alleges that this incident was a mere pretext for her discharge. Browning Affidavit ¶ 10 (JA 17). A disciplinary warning from Ladd describes this incident as follows:

> In addition to these problems associated with the manner and quality of the reporting you perform for

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[4] Browning asserted that as a general matter she "diligently and competently carried out her assigned tasks . . . ." Browning Affidavit ¶ 8. She also admits, however, that on several occasions her performance was poor, which she sought to excuse because these incidents "occurr[ed] at a time of extreme difficulties in her family . . . ," Complaint ¶ 11, and while she was "under great stress . . . ." Browning Affidavit ¶ 8. The significance of these facts rests with their importance in demonstrating that the focus of a trial on the merits would concern Browning's performance *as it touches the legislative process.*

the Clerk, your record of page production is consistently the lowest of the reporting corps.

The most recent incident concerns your failure to accurately and thoroughly report a committee hearing of the Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, on Involvement of Organized Crime in the Hazardous Waste Disposal Industry, December 16, 1980. By letter from the Chairman, we were adadvised that large gaps existed in the transcript, in some cases comprising omissions of whole paragraphs of testimony. Testimony during this hearing was taken under oath to insure veracity and for possible use in judicial proceedings in the event that responses by witnesses were determined to be false or perjurious. The subsequent release and review of the tape-recorded version of the hearing has revealed gross errors and omissions and has resulted in embarrassment to this office, as the supervisory office for official reporters, and to the U.S. House of Representatives. The failure to provide an accurate transcription of the hearing to the committee has damaged the investigative process of the subcommittee and may subject the subcommittee and/or House to possible legal action.

Browning admits these errors, but denies their significance. Browning Affidavit ¶ 8 (JA 16). Finally, Browning alleges that the Speaker of the House of Representatives participated in her discharge in that he "permitted and authorized the other defendants, over whom he had supervisory authority, to engage in the discriminatory conduct complained of . . . and refused to take corrective action when the wrongful conduct was brought to his attention." Complaint ¶ 13 (JA 6-7).

In the district court, the congressional defendants moved to have the complaint dismissed under Rules 12

(b)(1), (2), and (6) of the Federal Rules of Civil Procedure.[5] The district court, claiming reliance upon this court's decision in *Walker v. Jones*, 733 F.2d 923 (D.C.Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 512, 83 L.Ed.2d 402 (1984), denied the motion. *See Browning v. Clerk, U.S. House of Representatives*, No. 84-1637 (D.D.C. filed Dec. 17, 1984). The congressional defendants then immediately brought this appeal.[6]

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[5] In addition to their assertion of Speech or Debate Clause immunity, the defendants raised claims of official immunity, judicial restraint/separation-of-powers, and failure to state a claim upon which relief can be granted. *See* House Defendants' Motion to Dismiss and Memorandum of Points and Authorities in Support of House Defendants' Motion to Dismiss, No. 84-1637 (D.D.C. filed Aug. 10, 1984).

[6] Although the district court has not entered final judgment in this case, this appeal was nevertheless properly taken under 28 U.S.C. § 1291 (1982). Issues of Speech or Debate Clause immunity may be immediately appealed. *See Helstoski v. Meanor*, 442 U.S. 500, 506, 99 S.Ct. 2445, 2448, 61 L.Ed.2d 30 (1979). The rationale underlying this rule is that the Speech or Debate Clause was intended not only to protect legislators from liability, but also to protect them from the time-consuming burden of defending their actions in court and diverting their efforts from their congressional duties. In *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951), concerning a state legislator's immunity from suit under the federal civil rights law granting a damage remedy for violation of a person's civil rights, the Supreme Court stated:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motive.

Tenney v. Brandhove, 341 U.S. 367, 377, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951). *See Helstoski*, 442 U.S. at 507-08, 99 S.Ct. at 2448-49.

II. ANALYSIS

This case presents the question of the proper scope of the immunity guaranteed by the Speech or Debate Clause in the context of congressional personnel decisions.[7] Although our analysis is informed by this court's recent decision in *Walker v. Jones*, the instant appeal concerns activities within the legislative core. We approach our task with some caution in light of the importance of the Speech or Debate Clause to the separation of powers which is central to our constitutional form of government.

A.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The relatively short judicial history of this clause has witnessed considerable interpretation as Congress has changed the way in which it performs its duties. Although the literal scope of this clause is limited, it is well-settled that the clause protects more than simply speeches and debates by Representatives and Senators on the floors and in the committees of the Congress. For example, the Supreme Court has held that the clause protects all "things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 13 Otto 168, 103 U.S. 168, 204, 20 L.Ed. 377 (1881). It is equally clear that the clause protects Members' aides or assistants insofar as their conduct would be protected if performed by the Member himself. *See Gravel v. United States*, 408 U.S. 606, 618, 92 S.Ct. 2614, 2623, 33 L.Ed.2d 583 (1972).

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[7] Because we decide that the district court should have dismissed this lawsuit upon Speech or Debate Clause grounds, we need not reach the other issues raised in this appeal, *viz.*, official immunity, judicial restraint/separation-of-powers, and failure to state a claim, *see supra* note 5.

Congressional personnel decisions present difficult questions of Speech or Debate Clause immunity because the congressional action at issue may be slightly removed from the direct legislative process. In construing the Speech or Debate Clause in this context, we are mindful of James Madison's advice that "[i]n the application of the [Speech or Debate Clause] to emerging cases . . . the reason and necessity of the privilege must be the guide." 4 Writings of James Madison 221 (1865). Thus, we employ a functional approach to interpreting the Speech or Debate Clause, being further influenced by the view that the clause "ought not be to construed strictly, but liberally, that the fully design of it may be answered." *Coffin v. Coffin*, 4 Mass. 1 (1808), *quoted in Kilbourn*, 13 Otto 168, 103 U.S. at 203. *See United States v. Johnson*, 383 U.S. 169, 180, 86 S.Ct. 749, 755, 15 L.Ed.2d 681 (1966); *McSurely v. McClellan*, 553 F.2d 1277, 1284 (D.C.Cir. 1976), *cert. dismissed*, 438 U.S. 189, 98 S.Ct. 3116, 57 L.Ed.2d 704 (1978).

The Speech or Debate Clause is intended to protect the integrity of the legislative process by restraining the judiciary and the executive from questioning legislative actions.[8] *United States v. Brewster*, 408 U.S. 501, 507, 92 S.Ct. 2531, 2535, 33 L.Ed.2d 507 (1972). In so shielding the legislative branch from judicial scrutiny, the clause seeks to protect legislators "not only from the consequences of litigation's results, but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S.Ct. 1425, 1427, 18 L.Ed.2d

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[8] [I]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive . . . . 8 Works of Thomas Jefferson 322-23 (Ford ed. 1904).

577 (1967).[9] Without this protection legislators would be both inhibited in and distracted from the performance of their constitutional duties.

Both of these interests are embodied in the Supreme Court's oft-quoted test of Speech or Debate Clause immunity:

> The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an *integral part* of the deliberative and communicative processes by which Members participate in Committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel, 408 U.S. at 625, 92 S.Ct. at 2627 (emphasis added). *See Eastland v. United States' Servicemen's Fund*, 421 U.S. 491, 504, 95 S.Ct. 1813, 1821, 44 L.Ed.2d 324 (1975); *Doe v. McMillan*, 412 U.S. 306, 314, 93 S.Ct. 2018, 2025, 36 L.Ed.2d 912 (1973); *Consumers Union v. Periodical Correspondents' Association*, 515 F.2d 1341, 1350 (D.C.Cir. 1975). In a case decided contemporaneously with *Gravel*, the Supreme Court clarified its reading of the Speech or Debate Clause, stating: "The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *United States v. Brewster*, 408 U.S. 501, 528, 92 S.Ct. 2531, 2545, 33 L.Ed.2d 507 (1972).

B.

In *Walker v. Jones*, this court considered the scope of the Speech or Debate Clause immunity in the context

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[9] *See supra* note 6.

of a congressional personnel decision.[10] The plaintiff in *Walker* sued the congressional defendants alleging that she was discharged as general manager of the House of Representatives Restaurant System because she was a woman. *See Walker*, 733 F.2d at 925-26. The congressional defendants asserted that their actions were protected from judicial inquiry by the Speech or Debate Clause. *Id.* at 925.

By a divided panel, this court ultimately held that the congressional defendants could not avail themselves of the Speech or Debate Clause immunity. *Id.* at 928-32. In holding that the discharge of the restaurant manager fell outside the scope of the Speech or Debate Clause, this court identified the ultimate issue to be the *duties of the employee*. *Id.* at 930-31. Where the duties of the employee implicate Speech or Debate Clause concerns, so will personnel actions respecting that employee.

Judicial inquiry into the motivations behind Walker's discharge implicated none of the concerns of the Speech or Debate Clause. The decision recites two possible tests, both of which characterize Walker's position as non-legislative and suggest that the Speech or Debate Clause immunity should not apply. One test provided that the Speech or Debate Clause immunity would apply whenever the employee's duties reasonably could be described "as work that significantly informs or influences the shaping of our nation's laws." *Id.* at 931. This test suggests that the immunity attaches to personnel decisions where the employee has "meaningful input into . . .

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[10] A similar opportunity for the Supreme Court arose in *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). In *Davis*, the Supreme Court was called upon to review a Congressman's discharge of his deputy administrative assistant because she was a woman. The Supreme Court ultimately implied a cause of action under the Fifth Amendment in favor of the discharged employee. The Supreme Court refused, however, with the case in that posture, to consider the claim that the discharge was protected from judicial scrutiny by Speech or Debate Clause immunity. *Id.* at 235-36 n. 11, 99 S.Ct. at 2271-72 n. 11.

legislative decisionmaking." *Id.* at 930 (quoting *Davis v. Passman*, 544 F.2d 865, 880-81 n. 25 (5th Cir. 1977), *rev'd on other grounds*, 571 F.2d 793 (5th Cir. 1978) (en banc), *rev'd*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (*see supra* note 10)). The second test provided that Speech or Debate immunity would protect any personnel decision involving an employee whose duties were "peculiar to a Congress member's work qua legislator," or, stated differently, " 'intimately cognate' . . . to the legislative process." *Walker*, 733 F.2d at 931 (quoting *Davis*, 544 F.2d at 879).

In *Walker* these alternative tests served to suggest that personnel actions in the course of superintending congressional food services facilities were not shielded by the Speech or Debate Clause even though such facilities were great time savers for members of Congress and their staffs. Food services as well as other services catering to human needs are neither intimately cognate to the legislative process nor work that significantly informs the shaping of our Nation's laws. In the instant case, by contrast, there can be little doubt that an Official Reporter, performing duties such as the recording of sworn testimony of witnesses in a congressional investigation entitled "Involvement of Organized Crime in the Hazardous Waste Disposal Industry," plays a role that is "intimately cognate to the legislative process." *Id.* Nevertheless, the district court below held that the Speech or Debate Clause immunity does not apply to congressional personnel decisions involving the Official Reporters. The district court's holding seems to rest on an interpretation of the first test recited in *Walker*—the "meaningful input" test—which requires that before immunity will apply, the congressional employee's duties must entail *discretionary* input into the legislative process.[11] This

[11] It is unclear from the district court's opinion how the district court interpreted *Walker*. The court's one-paragraph order fails to explain its holding. *See Browning v. Clerk, U.S. House of Repre-*

court's holding in *Walker* was not meant to be so restrictive, however, and we attempt below to express a clearer test of the Speech or Debate Clause immunity.

C.

The touchstone to determining whether the Speech or Debate Clause immunity attaches is whether the activities at issue were "an integral part of the deliberative and communicative processes [of Congress]," *Gravel*, 408 U.S. at 625, such that the activity is legislative in character. Personnel decisions are an integral part of the legislative process to the same extent that the affected employee's duties are an integral part of the legislative process. *Cf. Agromayor v. Colberg*, 738 F.2d 55 (1st Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 515, 83 L.Ed.2d 405 (1984). Thus, if the employee's duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the "discharge of their functions," personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny.

To limit the scope of the Speech or Debate Clause immunity to personnel actions where the employee has discretionary input into the legislative process is far too restrictive a view. The Speech or Debate Clause is designed to preserve the integrity of the legislative proc-

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sentatives, No. 84-1637 (D.D.C. filed Dec. 17, 1984). But at oral argument, the district court did note the following, which suggests that the court understood *Walker* to apply the Speech or Debate Clause only to congressional personnel actions involving employees with discretionary input into the legislative process:

> The Court: . . . it seems to me that there is a fundamental difference between a member reporter who *selectively* records, as a Recording Secretary, the minutes of a meeting and *makes editorial judgments*, if you will, as to what is going into the official record, and *a verbatim transcript*, which is the human equivalent of a tape recorder.

Trial Transcript at 28 (emphasis added).

ess by preventing "intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181, 86 S.Ct. 749, 755, 15 L.Ed.2d 681 (1966). It is intended to shield legislators from "the hazard of a . . . jury's speculation as to motive," *Tenney v. Brandhove*, 341 U.S. at 377, 71 S.Ct. at 788, and thus must shield from judicial inquiry *all* matters within the legislative sphere. "The claim of an unworthy purpose does not destroy the privilege." *Id.*

On the other hand, it is equally important that this immunity not be understood to protect *any* matter however remotely related to the legislative process. The protected activity must be a part of "the *due functioning* of the legislative process." *Brewster*, 408 U.S. at 516, 92 S.Ct. at 2539. The clause cannot be read to include all things in any way related to the legislative process because "[g]iven such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *Id.* With these parameters in mind, we hold that the standard for determining Speech or Debate Clause immunity is best expressed as whether the employee's duties were *directly related to the due functioning of the legislative process.*

There can be little doubt that Browning's duties as an Official Reporter were directly related to the legislative process. The Official Reporters record floor and committee proceedings both for later use in forming legislation and to create a permanent record of the proceedings. Indeed, the accurate reporting of a committee investigation, because of the possibility of actions for contempt and perjury, could be more important than the reporting of speeches on the floor of Congress, which are submitted to Members prior to publication for correction, revision, and extension. A cursory look through the record of the instant case reveals the integral role fulfilled by the Official Reporters. Letters written on behalf of Browning,

included in the record for other reasons, refer to her duties in recording testimony before House committees both locally and "in the field" involving such matters as the Voting Rights Act extension, *see* JA 33, frauds against the elderly, *see* JA 34, and narcotics and drug abuse, *see* JA 35. As noted above,[12] at Browning's dismissal both Ladd and Henshaw referred to a particular assignment which Browning failed to execute properly concerning hearings before the House Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, on Involvement of Organized Crime in the Hazardous Waste Disposal Industry. The testimony was taken under oath to ensure veracity and for possible use in judicial proceedings should any of the testimony prove false or perjurious. *See* JA 11. Surely the recordation of these proceedings was directly related to the proper execution of this legislative investigation.[13] It is equally well-recognized that such an investigation is part of the due functioning of the House of Representatives. Along with the power to formulate legislation and the power to communicate within the legislature, the power to investigate clearly falls within the legislative sphere. *See Eastland*, 421 U.S. at 504, 95 S.Ct. at 1822. Thus,

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[12] *See supra* at 925 [App. 4a-5a].

[13] The history of the Official Reporters further indicates their integral role in the legislative process. Prior to the middle of the nineteenth century, the House of Representatives made no formal provision for stenographic reporting of committee hearings or floor debates. Only beginning about the time of the Civil War did Congress begin to employ Official Reporters. Notes had previously been taken by the individual Congressmen themselves. *See* L. McConachie, Congressional Committees: A Study of the Origins and Development of Our National and Local Legislative Methods 65 (1898).

Congress initially hired private reporters, but the lack of control over them persuaded Congress in 1866 to employ Official Reporters. *See* Cong. Globe, 38th Cong., 1st Sess. 300 (1866). This was the beginning of the House of Representatives' Office of Official Reporters.

the Speech and Debate Clause applies to shield the congressional action at issue here from judicial scrutiny.

Consideration of some of the questions a court would be required to pose in considering Browning's claim further illustrates the necessity of Speech or Debate Clause immunity here. *Cf. United States v. Johnson*, 383 U.S. 169, 184-85, 86 S.Ct. 749, 757-58 (1966) (a criminal prosecution dependent on inquiries into legislative matters contravenes the Speech or Debate Clause). For example, in assessing the adequacy of Browning's performance a court would necessarily have to inquire about matters at the very heart of the legislative process, such as the nature of the hearings to which Browning was assigned, the purposes underlying those hearings, and whether Browning's performance frustrated those purposes. But this sort of intrusion into the legislative sphere is exactly the sort of intrusion that the Speech or Debate Clause is designed to prevent. This is very different from a case like Walker, where Congressmen would be required to testify, if at all, only with respect to the operation of the House restaurants.

D.

In concluding that the nature of Browning's duties place this personnel action within the legislative sphere and therefore beyond the cognizance of the judiciary, we are not unmindful that Congress has provided for the resolution of its internal disputes.[14] Although we are not suggesting that a lack of alternative remedies would alter our decision today, we note that Congress has pro-

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[14] It is not suggested that the House Rules constitute an exhaustion requirement prior to litigation. The question of exhaustion is not before the court because on this interlocutory appeal the only question properly before the court is the question of Speech or Debate Clause immunity. *See* 28 U.S.C. § 1291; *Abney v. United States*, 431 U.S. 651, 662-63, 97 S.Ct. 2034, 2041-42, 52 L.Ed.2d 651 (1977). The question of exhaustion is saved for another case.

vided for internal procedures to address complaints such as Browning's.

The Rules of the House of Representatives authorize the Committee on Standards of Official Conduct to investigate alleged violations of the House of Representatives' Code of Official Conduct or of any law, rule, or regulation by any member, officer or employee of the House.[15] *See* Rules of the House of Representatives, 97th Cong., Rule X, cl. 4(e)(1)(B). Under these rules an investigation may be conducted either upon the complaint of a member of the House, or by an individual not a member of the House whose complaint is accompanied by three written refusals by Representatives to transmit the complaint. *Id.*, cl. 4(e)(2)(B)(i) & (ii). These procedures have previously been invoked by non-members. *See, e.g., In the Matter of Representative Geraldine A. Ferraro*, H.R.Rep. No. 1169, 98th Cong., 2d Sess. (1984) (where a non-member brought a complaint seeking an investigation of alleged discrepancies in Representative Ferraro's financial disclosures).

The Rules of the Committee on Standards of Official Conduct set forth the procedures to be followed in considering such complaints. *See* Rules of the Committee on Standards of Official Conduct, 97th Cong., Rules 9-21. These Rules provide that for violations by Representatives, the Committee may recommend to the House that the member be expelled, censured, reprimanded, fined,

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[15] This is broad enough to include constitutional violations. Moreover, the acts of the congressional defendants here, if true, would also constitute a violation of House of Representatives Rule XLIII, the Code of Official Conduct, which provides that "[a] Member, officer or employee of the House of Representatives shall not discharge or refuse to hire any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Rules of the House of Representatives, 97th Cong., Rule XLIII, cl. 9.

denied privileges, and assessed "[*a*]*ny other sanction determined by the Committee to be appropriate.*" *Id.*, Rule 17(b)(1)(A)-(F) (emphasis added). Violations by employees may be punished by dismissal, fine, and "[a]ny other sanction determined by the Committee to be appropriate." *Id.*, Rule 17(b)(2)(A)-(C). It is not clear from these Rules whether Browning could obtain damages for violation of her constitutional rights. But it is clear that significant redress is available to her within the Congress. The authority to impose an "appropriate . . . sanction" is a broad grant of power to redress grievances.

III. CONCLUSION

We hold that Browning's duties as an Official Reporter were directly related to the due functioning of the legislative process, and as such the personnel decision in her case is nonjusticiable under the Speech or Debate Clause. We do not reach this conclusion lightly, as we are mindful of the conflict between Browning's constitutional rights and the important separation-of-powers concerns embodied in the Speech or Debate Clause. The framers of the Constitution were aware of the potential risks that this immunity created, however, and the free and unreserved exercise of the duties of a representative "was the conscious choice of the Framers." *Brewster*, 408 U.S. at 516, 92 S.Ct. at 2539. "In the American governmental structure the clause serves the additional function of reenforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 178, 86 S.Ct. 749, 754, 15 L.Ed.2d 681 (1966).

For the foregoing reasons, we reverse the order of the district court and remand this case with instructions to dismiss the complaint for want of subject matter jurisdiction.

Judgment Accordingly.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 85-5144

BETTY G. BROWNING

v.

CLERK, U.S. HOUSE OF REPRESENTATIVES, *et al.*,
Appellants.

July 8, 1986

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 84-01637)

Linda Huber was on the suggestion for appellee.

Before ROBINSON, Chief Judge, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, STARR, SILBERMAN and BUCKLEY, Circuit Judges, and MACKINNON, Senior Circuit Judge.

ON APPELLEE'S SUGGESTION FOR
REHEARING EN BANC

ORDER

PER CURIAM.

Appellee's suggestion for rehearing *en banc* has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellee's suggestion is denied.

Separate statements of Circuit Judge GINSBURG, and Senior Circuit Judge MACKINNON are attached.

GINSBURG, Circuit Judge:

The court's opinion in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C.Cir. 1986), preserves this circuit's prior decision in *Walker v. Jones*, 733 F.2d 923 (D.C.Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 512, 83 L.Ed.2d 402 (1984), but is inconsistent with the views expressed by the original Fifth Circuit panel in *Davis v. Passman*, 544 F.2d 865, 880 (5th Cir. 1977), *rev'd on other grounds*, 571 F.2d 793 (5th Cir. 1978) (en banc), *rev'd*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

Walker held Speech or Debate Clause immunity inapplicable to personnel decisions about jobs—for example, managing food services—"entail[ing] no function relating to the process of making laws." *Walker*, 733 F.2d at 930-31; *see Browning* at 927-28, 930. *Walker* left open two broader issues. (1) Does Speech or Debate Clause immunity apply at all to decisions to dismiss persons employed by the legislative branch? (2) If the immunity does apply in at least some cases, is it limited to jobs with a "meaningful input" into legislative decision-making? These questions, which *Walker* reserved "for another day and case," 733 F.2d at 930, are decided in *Browning*. The answers *Browning* supplies are: (1) Speech or Debate Clause immunity does apply to legislative branch personnel decisions; (2) the immunity is *not* limited to cases in which the employee's work "informs or influences the shaping of our nation's laws." *See Walker*, 733 F.2d at 931. Rather, Speech or Debate Clause immunity, *Browning* holds, covers personnel decisions regarding any employee whose duties are "directly related to the due functioning of the legislative process," for example, recording and transcribing committee hearings. *Browning*, at 929 (emphasis omitted).

Eminent colleagues in the Fifth Circuit, Judges Goldberg and Brown, entertained a different view of the questions left open in *Walker* and closed in *Browning*. It was their position, stated by Judge Goldberg, that

> [w]hen members of Congress dismiss employees they are neither legislating nor formulating legislation. The fear of judicial inquiry into dismissal decisions cannot possibly affect a legislator's decisions on matters pending before Congress. The democratic process remains unfettered.

Davis v. Passman, 544 F.2d at 880.

While I do not call for an en banc rehearing of *Browning* in this circuit, I believe the different views held by federal judges on congressional immunity from suit for alleged employment discrimination indicate the need for further enlightenment from Higher Authority.

MACKINNON, Senior Circuit Judge:

A congressional reporter transcribing a hearing involving organized crime, where the testimony will be closely scrutinized by the Congress and possibly by courts for perjury, is working in an area that "influences the shaping of our nation's laws[,]" *Walker v. Jones*, 733 F.2d 923, 931 (D.C. Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 512, 83 L.Ed.2d 402 (1984). Assuring accurate testimony in such an important field is "*directly related to the due functioning of the legislative process . . . .*" *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 929 (D.C. Cir. 1986) (emphasis in original).

The fact that the court in *Davis v. Passman*, 544 F.2d 865, 880 (5th Cir. 1977), added some broad language that went beyond the facts of the case they were deciding does not create any dicta that is troublesome for this court. It merely did not reach some of the major matters that are critically important to congressional action, i.e., a correct transcript of important Committee investigative hearings upon which Congress might act to legislate or recommend prosecution for perjury.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1637

BETTY G. BROWNING,

Plaintiff,

v.

CLERK, U.S. HOUSE OF REPRESENTATIVES, *et al.*,

Defendants.

[Filed Dec. 17, 1984]

ORDER

Upon consideration of the Congressional defendants' motion to dismiss, plaintiff's opposition thereto, and the oral argument by counsel in open court on December 14, 1984, and in accordance with *Walker* v. *Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3403 (November 26, 1984), for the reasons set forth upon the record, it is, this 14th day of December, 1984,

ORDERED, that defendants' motion to dismiss is denied.

/s/ T. P. Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1637

BETTY BROWNING,
Plaintiff,

v.

CLERK, U.S. HOUSE OF REPRESENTATIVES, *et al.*,
Defendants.

Washington, D.C.
December 14, 1984

The above-entitled matter came on for oral argument before the Honorable Thomas P. Jackson, United States District Judge, at 2 o'clock.

Appearances:

LINDA HUBER, ESQ.
For the Plaintiff

STEVEN R. ROSS, ESQ.
MICHAEL L. MURRAY, ESQ.
For the Defendants

[2] PROCEEDINGS

THE DEPUTY CLERK: Civil Action 84-1637, Betty Browning v. Clerk, U.S. House of Representatives, et al.

Linda Huber for the Plaintiff. Michael L. Murray and Steven R. Ross for the Defendants.

* * * *

[28] THE COURT: I am not suggesting that it is not important, but it seems to me that there is a fundamen-

tal difference between a member reporter who selectively records, as a recording secretary, the minutes of a meeting and makes editorial judgments, if you will, as to what is going into the official record and a verbatim transcript, which is the human equivalent of a tape recorder.

* * * *

[31] THE COURT: All right. I think that if you can speak of Walker v. Jones and Consumers Union as two ends of a spectrum, this case is far closer to the Walker case than it is to Consumers Union.

And I believe that I am governed by Walker v. Jones insofar as this case is concerned.

I am going to deny the Motion to Dismiss. This may be your opportunity to reargue it, Mr. Ross.

The Motion to Dismiss is denied.

* * * *

THE COURT: I will enter an Order simply stating that for the reasons that I have stated on the record, the Motion to Dismiss is denied.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

Civil Action No. 84-01637

No. 85-5144

BETTY G. BROWNING

v.

CLERK, U.S. HOUSE OF REPRESENTATIVES, *et al.*,
Appellants

Appeal from the United States District Court
for the District of Columbia

[Filed April 25, 1986]

Before: WALD and SILBERMAN, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this

cause is hereby reversed and this case is remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: April 25, 1986

Opinion for the Court filed by Senior Circuit Judge MacKinnon.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

Civil Action No. 84-01637

No. 85-5144

BETTY G. BROWNING

v.

CLERK, U.S. HOUSE OF REPRESENTATIVES, *et al.*,
Appellants

[Filed July 8, 1986]

Before: WALD and SILBERMAN, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

ORDER

Upon consideration of appellee's petition for rehearing it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-547

In the Supreme Court of the United States

OCTOBER TERM, 1986

BETTY G. BROWNING, PETITIONER

v.

CLERK, UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STEVEN R. ROSS (Counsel of Record),
General Counsel to the Clerk.
CHARLES TIEFER,
Deputy General Counsel to the Clerk.
MICHAEL L. MURRAY,
Assistant Counsel to the Clerk.
JANINA JARUZELSKI,
Assistant Counsel to the Clerk.
U.S. House of Representatives,
The Capitol, H-105,
Washington, D.C. 20515.
(202) 225-9700

NOVEMBER 3, 1986

QUESTION PRESENTED

Does the Speech or Debate Clause bar a civil damages action brought by a legislative employee terminated for inadequate performance in relation to the conduct of a Congressional committee hearing?

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-547

BETTY G. BROWNING, PETITIONER

v.

CLERK, UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondents, the Honorable Benjamin J. Guthrie, Clerk of the United States House of Representatives; the Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives; Thomas Ladd, the Assistant to the Clerk of the House of Representatives; and Geraldine Lyda, the Director of the Office of Official Reporters for the House of Representatives ("House parties") respectfully request that Betty G. Browning's petition for writ of certiorari be denied.

OPINIONS BELOW

Petitioner seeks review of *Browning v. Clerk, U.S. House of Representatives,* 789 F.2d 923 (D.C. Cir. 1986). The opinions are correctly identified in the Petition, although what Petitioner repeatedly describes as the separate opinions of Judges MacKinnon and Ginsburg are more accurately identified as concurrences in the Court of Appeals' unanimous decision to deny hearing.

JURISDICTION

Jurisdiction is accurately set forth in the petition.

STATEMENT OF THE CASE

Respondents are all officers and employees of the U.S. House of Representatives; the Petitioner, Betty G. Browning, is a former House employee. She served as an Official House Reporter until her discharge for unsatisfactory performance.

In December 1980, Petitioner Browning was assigned to report a hearing of the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. The Subcommittee was investigating the role of organized crime in the hazardous waste disposal industry, and the hearing that Browning was to report was highly sensitive.[1] The Subcommittee had arranged for a direct confrontation, under oath, of two key witnesses: one an informant brought in specially from the Federal Witness Protection Program, the other a reputed mobster, who, allegedly, was among the select handful of persons directing organized crime's takeover of the toxic waste disposal industry. The Subcommittee hoped to obtain crucial information. Furthermore, it was anticipated that some of the testimony might ultimately present the possibility of a perjury prosecution. Because of the importance of the hearing and the expectation that the testimony might subsequently be used in judicial proceedings, the accuracy of Browning's work was crucial.

At the hearing, the two witnesses did in fact give strongly worded and directly contradictory testimony on a number of questions of great interest to both the public and the legislators. Upon review, however, the Subcommittee discovered, to its dismay, that Browning's report of the proceeding was so riddled with errors as to be virtually useless. She had missed whole chunks of testimony.

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[1] *Organized Crime and Hazardous Waste Disposal: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. (1980).

Much of what she had not missed was garbled beyond recognition.[2]

The Subcommittee Chairman dispatched a letter to the Office of the Clerk describing the incident and expressing deep dissatisfaction with Browning.[3] As a result of Browning's mistakes, the achievements of the hearing were largely lost, and the Subcommittee's investigation was hindered. In addition, both her supervisor and the Clerk's Office as a whole were severely embarrassed. When confronted with this disaster, Browning admitted she had done a poor job but refused to acknowledge the seriousness of the incident. Instead, she insisted that the problem was "minor," and that, in any event, whatever errors she made were fully excused by the emotional distress she felt at the time over her son's incarceration in the District of Columbia jail.[4]

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[2] The termination letter sent Browning by Respondent Thomas Ladd stated:

> By letter from the Chairman, we were advised that *large gaps existed in the transcript, in some cases comprising omissions of whole paragraphs of testimony*. . . . [Verification of the transcripts] revealed *gross errors and omissions* and has resulted in embarrassment to this office, as the supervisory office for official reporters, and to the U.S. House of Representatives.

Joint Appendix in the Court of Appeals ("J.A.") at 11 (emphasis added). This letter is part of the record in this case.

[3] *See supra* note 1.

[4] Browning's apparent lack of concern or contrition was noted in the termination letter:

> [Y]our response to this grave matter when revealed to you by your supervisor, Ms. Geraldine Lyda, indicates a complete disregard for the import of the situation. . . . Your failure to diligently pursue correction of the myriad of errors . . . reflects negatively on your ability to meet the demanding job requirements of your position.

J.A. at 11–12.

Petitioner's own affidavit, submitted as a supplement to her Complaint, verifies both the existence of the mistakes and her somewhat cavalier attitude towards them:

Continued

The Clerk's office had long been dissatisfied with Browning's performance. Her output was consistently the lowest in the reporters' corps.[5] Her lamentable performance at the hearing combined with her continued apparent indifference to the problems she had created proved the final straw, and her termination was initiated.

Although internal remedies were available to Browning, she did not avail herself of them.[6] Instead, she waited almost three years and then sued the Speaker of the House, her immediate supervisor, and two House officials, claiming that she had been discharged because of her race and that her due process rights had been violated.

Defendants moved to dismiss on grounds of Speech or Debate and official immunity. Based on a misunderstanding of the Court of Appeals decision in *Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984), the district court denied the motion. Defendants appealed, and the Court of Appeals for the District of Columbia Circuit reversed. The Court of Appeals, per Judges Wald, Silberman, and MacKinnon, concluded that the district court had misconstrued and misapplied

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> At the time of this hearing, I was under great stress because my son was incarcerated in the District of Columbia Jail on criminal charges. . . . Although, because of my state of mind due to the above circumstances, *I made some mistakes* in the stenotype reporting of this hearing, I do not believe they were so extensive as Ms. Lyda claimed. . . .

J.A. at 16 (emphasis added).

[5] Plaintiff's own affidavit acknowledges that her "page production of hearing transcripts [was] low compared to other reporters." J.A. at 17; *see also* J.A. at 9, 11 (letters to Browning from Clerk's Office).

[6] The availability of internal remedies and Browning's failure to make use of them were raised below. The point was duly noted by the Court of Appeals, which stated that it was "not unmindful that Congress has provided for the resolution of its internal disputes." *Browning*, 789 F.2d at 930. The court declined to address the exhaustion question, however, because "on this interlocutory appeal the only question properly before the court is the question of Speech or Debate Clause immunity." *Id.* at 930 n.14.

Walker. The appellate court pointed out that *Walker* was an unusual and very narrow exception to the general rule applying Speech or Debate Clause immunity.

The Court of Appeals went on to discuss at length the importance of the role of an Official Reporter in the communicative and deliberative processes of Congress. *Cf. Gravel v. United States*, 408 U.S. 606, 624 (1972) (protection of privilege surrounding congressional communicative processes). The court found that such reporting was indeed an integral part of legislative functioning. Accordingly, the court concluded that the defendants' good faith in discharging Browning should not be subject to judicial investigation and review.

In reaching this conclusion, the court applied traditional Speech or Debate Clause analysis, relying almost exclusively on such classic Supreme Court cases as *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975); *Gravel, supra; Dombrowski v. Eastland,* 387 U.S. 82 (1967); and *Tenney v. Brandhove,* 341 U.S. 367 (1951). The court also gauged the practical consequences of permitting such a suit. As the court noted, in order to resolve Browning's claims, the judiciary:

> would necessarily have to inquire about matters at the very heart of the legislative process, such as the nature of the hearings to which Browning was assigned, the purposes underlying those hearings, and whether Browning's performance frustrated those purposes.

Browning, 789 F.2d at 930. The appellate court quite correctly recognized that "this sort of intrusion into the legislative sphere is exactly the sort of intrusion that the Speech or Debate Clause is designed to prevent." *Id.*

Browning petitioned the Court of Appeals for rehearing *en banc*. Her request was unanimously denied. Senior Judge MacKinnon, author of the *Browning* opinion, and Judge Ginsburg, author of the *Walker* opinion, attached very brief separate statements. *Browning,* 793 F.2d 380

(D.C. Cir. 1986) (denial of rehearing). Both concurred in the decision to deny rehearing.

On July 3, 1986, Browning filed the instant petition for certiorari, putting forth the theory that *Browning* conflicts with the rulings of other circuits.

REASONS FOR DENYING THE WRIT

The House Parties oppose granting certiorari because this case does not meet the standards set forth in Sup. Ct. R. 19. The ruling of the Court of Appeals does not conflict with the D.C. Circuit's own prior rulings or with those of other circuits. Its narrow, noncontroversial nature is illustrated both by the unanimity of the panel of Judges Wald, Silberman, and MacKinnon and the unanimity of the Circuit as a whole in denying the petition for rehearing.[7] Contrary to the suggestions of the petitioner, the question addressed and decided below was a narrow one. The decision concerns only a small number of Congressional employees, and its practical consequences are limited. Moreover, the Circuit's decision is in keeping with the tenor of this Court's Speech or Debate Clause interpretation.

1. *Browning* Does Not Conflict With the Views of the Fifth Circuit.

Browning's principal claim is that the D.C. Circuit and the Fifth Circuit are in conflict. She purports to find this conflict by contrasting the D.C. Circuit's opinion with the original Fifth Circuit panel opinon in *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *rev'd*, 571 F.2d 793 (5th Cir. 1978) (*en banc*), *rev'd*, 442 U.S. 228 (1979). The principal flaw in this argument is the very premise that the original panel decision in *Passman*, later reversed *en banc*, actually represents the current views of the Fifth Circuit. Such a premise is of very doubtful validity considering the tortured history of the *Passman* litigation, which is

[7] The petitioner's extensive reliance on the brief separate opinion of Judge Ginsburg regarding rehearing *en banc* is misplaced. Judge Ginsburg concurred in the Circuit's decision to deny rehearing.

reflected in the case cite. The Petitioner first asks this Court to infer the settled position of the Fifth Circuit from a divided panel opinion that was subsequently reversed *en banc*. She then asks this Court to rely on its inferences about the Fifth Circuit's views to grant certiorari. This is far too weak a thread upon which to hang a claim for a place on this Court's crowded docket.

In *Davis v. Passman*, a Congressional employee sued Louisiana Congressman Otto Passman, alleging that he had fired her solely because she was a woman and he wanted a man for the job. The District Court for the Western District of Louisiana dismissed the suit. A divided Fifth Circuit panel reversed. The two-judge panel majority declared that a private cause of action could be implied under the Fifth Amendment and that the employment decision was outside the scope of the Speech or Debate Clause. In reaching this conclusion, the majority made a number of questionable statements, including the assertion that the Clause is of very "limited scope," a position that flies in the face of this Court's stated view that the Clause must be "read . . . broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501, a view subsequently emphasized by the observation that "the guarantees of that Clause are vitally important to our system of government and therefore are entitled to be treated by the courts with the sensitivity that such important values require." *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Judge Jones dissented on the Speech or Debate point stating:

> It seems to me that the judges should refrain from wearing their robes in the halls of the Congress. The doctrine of separation of powers should, I believe, require the affirmance of the dismissal of this section.

Passman, 544 F.2d at 882 (Jones, J., dissenting).

Congressman Passman petitioned for rehearing *en banc*. His petition was granted, and the Court of Appeals for the Fifth Circuit sitting *en banc* reversed the panel's

majority decision. *Passman,* 571 F.2d 793, 795 (5th Cir. 1978) (*en banc*). The *en banc* court declared that no cause of action could be implied, and, therefore, did not reach the Speech or Debate Clause issue. This Court granted certiorari and reversed the decision of the *en banc* court. This Court concluded that a cause of action could be implied. Although four justices thought the Court should address the Speech or Debate Clause and separation of powers issues and declare them a bar to further litigation, *see Passman,* 442 U.S. at 249–55 (dissenting opinions), the majority declined to express its views in the absence of a definitive ruling from the Fifth Circuit, *see id.* at 236 n.12. The Court instead remanded. Because the parties subsequently reached an accommodation out of court, the Fifth Circuit never had the opportunity to clarify its views and its position remains uncertain.

In addition it must be noted that the *Passman* case differed starkly from this one. The *Passman* plaintiff had served until termination on the Congressman's personal staff. Furthermore, she had in her hand a letter from the Congressman saying that he was terminating her because she was a woman. Thus she could argue vigorously that her suit would not intrude at all into the Congressional committee investigative and legislative processs. In contrast, Browning's termination for poor performance on a Congressional investigation [8] would require the courts to haul in a Congressional committee to scrutinize its operations, and for the first time open up such investigations to outside distraction and harassment by multitudes of

[8] Here, the termination letter and other communications focused solely on the Plaintiff's inadequate job performance. The Plaintiff herself admits she made mistakes and that her output was low. Her case rides on the assertion that these deficiencies, although real, were not the true reason for her dismissal. Thus the controversy could only be adjudicated by inquiring closely into the internal procedures of the legislature, comparing Browning's treatment for her performance at committee hearings and meetings to the treatment accorded other employees, second-guessing the House's assessment of the seriousness of her errors, and probing the motives of those involved.

litigants—employees, witnesses, targets, the Executive Branch, or even Members with minority views. In *Eastland v. United States Servicemen's Fund,* this Court strongly affirmed its intention not to lend judicial process to those who seek to invade the sphere of Congressional investigations. In sum, the *Passman* case differs so fundamentally from this one that there could never have been a "conflict" in the holdings, even if the Fifth Circuit had let stand the divided *Passman* panel's opinion instead of reversing it *en banc.*

2. *Browning* Does Not Conflict With Decisions in Other Circuits.

Petitioner's claim that *Browning* conflicts with the law in circuits other than the Fifth is equally unfounded. Neither of the recent decisions in other circuits she cites present a conflict with the D.C. Circuit's ruling in *Browning.*

In *Agromayor v. Colberg,* 738 F.2d 55 (1st Cir.), *cert. denied,* 105 S. Ct. 515 (1984), the Court of Appeals for the First Circuit dismissed a legislative employee's discrimination suit, finding the defendant legislator immune, just as the District of Columbia Circuit did here.

Agromayor, a journalist of Argentine birth, applied unsuccessfuly for a job as press officer to the Puerto Rican House of Representatives. Initially, the Minority Leader indicated a willingness to hire him. Shortly thereafter, however, the Plaintiff published articles in a local newspaper sharply criticizing the legislature in general and the President of the Puerto Rican House in particular. The President—Defendant Colberg—then told Agromayor that, because of his negative comments and because he was not a native Puerto Rican, he would not be hired. Agromayor sued the House President under section 1983 alleging, *inter alia,* discrimination on the basis of national origin.

The First Circuit accepted as true Agromayor's allegation that he had been denied employment because of his Argentine birth. *See Agromayor,* 738 F.2d at 58. The court nevertheless concluded that the Defendant legislator was

immune. Even though the Defendant had made no allegations of performance deficiencies,[9] and even though the Plaintiff's duties, if he had been hired, would have involved external public relations rather than the internal functioning of the House, the First Circuit had no doubt that his discrimination suit was barred. That Circuit reasoned that any "employee dealing with the deliberative and communicative processes *must be* of direct legislative importance." *Id.* at 60 (emphasis added) (citations omitted). Obviously, an Official Reporter "deal[s] with the deliberative and communicative processes." Thus, under the First Circuit's formulation, Browning's suit must be barred just as Agromayor's was. Far from conflicting with *Browning,* the *Agromayor* court's reasoning leads to the same conclusion: Browning's suit is not justiciable.

The petitioner also claims to find a "circuit split" in *McMillan v. Svetanoff,* 793 F.2d 149 (7th Cir. 1986), *cert. pending,* No. 86-384 (application filed Sept. 8, 1986). In reality, *Svetanoff* is very different both factually and legally. Indeed, petitioner herself implicitly concedes that

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[9] In *Agromayor,* for example, the Defendants never claimed that the Plaintiff was deficient in the necessary skills or incompetent in any way. It was, in essence, conceded by all sides that the Defendant's refusal to hire him was not job-related in the strict sense. Adjudication could have been had without analyzing anyone's performance within the legislature. The present case is strikingly different. Here, the termination letter and other communications focused solely on the Plaintiff's inadequate job performance.

Agromayor also involved a "state" legislature and thus common law immunity. The present case deals with the U.S. House of Representatives and, therefore, implicates the Speech or Debate Clause of the U.S. Constitution. Although the common law immunity and Speech or Debate Clause doctrines share certain underpinnings, they are different in source and cannot be assumed to be coextensive. *See United States v. Gillock,* 445 U.S. 360 (1980). The First Circuit duly noted this consideration in *Agromayor.* The court observed that "unlike the constitutional immunity for Congressmen, [common law] immunity is not based upon the separation of powers" and, consequently, "decisions construing the Clause do not necessarily define the boundaries of the section 1983 immunity." *Agromayor,* 738 F.2d at 58, 59.

there is no *bona fide* conflict between the two cases when she attempts to finesse the point with the claim that they differ "in principle."

Svetanoff involved an employment dispute in the state court system.[10] The doctrine of immunity for state judges, dealt with in *Svetanoff,* is a common law doctrine created in response to practical concerns. The Speech or Debate Clause upon which this case turns is very different. Speech or Debate immunity derives from the text of the Constitution. Its purpose is to reinforce the Separation of Powers—to prevent overreaching by the Executive and possible intimidation before a hostile judiciary. Because of the different sources and purposes of the two immunities there is no reason to expect them to function in the same way, and they do not.[11]

CONCLUSION

Responsible House officials terminated Petitioner because her inadequate performance damaged an important Subcommittee investigation and discredited the Congress of the United States. The Court of Appeals correctly determined that the power to make such a termination decision is a necessary incident of the Legislative Branch's constitutional power to manage its own affairs and could

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[10] An elected state judge had begun his service with the wholesale firing of the entire staff of his courtroom. There was no suggestion that any of the firings resulted from poor job performance. One of the employees, McMillan, filed suit claiming discrimination on the basis of race and party affiliation. The Seventh Circuit rejected the judge's immunity claim on the grounds that a long line of cases had established the relatively narrow focus of the judicial immunity doctrine and application of the immunity here would "not further the objective of the doctrine." *Id.* at 155.

[11] *Svetanoff* indicates that the litigation of a court employee's claim against one member of the judiciary before another member of the judiciary may be accomplished without threatening the purposes of the common law doctrine of judicial immunity. It does not follow that an official reporter's claim against the House may be litigated before another branch, the judiciary, without jeopardizing the Separation of Powers principles crystallized in the Speech or Debate Clause.

not, consistent with the Speech or Debate Clause, be subjected to judicial review. The court's carefully reasoned opinion falls in the mainstream of judicial reasoning in the Speech or Debate Clause area and requires no review by this Court. Accordingly, the Respondents respectfully request that the writ of certiorari be denied.

Respectfully submitted,

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